(4)

No. 97-8629

In The

Supreme Court of the United States

October Term, 1998

EDDIE RICHARDSON,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

JOINT APPENDIX

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Petition for Certiorari Filed: April 7, 1998
Certiorari Granted: October 5, 1998

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80 pp

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

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RELEVANT CRIMINAL DOCKET ENTRIES

3/23/94	1	INDICTMENT Counts filed against Eddie Richardson (1) count(s) 1, 2, Carmen Tate (2) count(s) 1, 2, 3, Andre Cal (3) count(s) 1, Johnnie Chew (4) count(s) 1, Sectric Curry (5) count(s) 1, Kerry Dockery (6) count(s) 1, Anthony Elliot (7) count(s) 1, Nate Hall (8) count(s) 1, Lydell Johnson (9) count(s) 1, William Johnson (10) count(s) 1, Martell Lee (11) count(s) 1, Rodney Palmer (12) count(s) 1, Michael Sargent (13) count(s) 1, Thaddeus Scott (14) count(s) 1, Lennel Smith (15) count(s) 1, Randy Teague [sic] (16) count(s) 1, Kenny Terrell (17) count(s) 1, Juanita Thomas (18) count(s) 3, Donald Tillman (19) count(s) 1, Joseph Westmoreland (20) count(s) 1, Stanley Westmoreland (21) count(s) 1 (sn) [Entry date 04/04/94]
5/10/95	567	MINUTE ORDER of 5/10/95 by Hon. James F. Holderman as to Eddie Richardson, Carmen Tate, Sectric Curry, Kerry Dockery, Nate Hall, William Johnson, Martell Lee, Rodney Palmer, Lennel Smith, Randy Teagus and Stanley Westmoreland: Jury trial held and continued to 5/11/95 at 9:30 a.m. Jury instruction

conference (informal) held. No notice (dmk) [Entry date 05/12/95]

5/11/95 568 MINUTE ORDER of 5/11/95 by Hon. James F. Holderman as to Eddie Richardson, Carmen Tate, Sectric Curry, Kerry Dockery, Nate Hall, William Johnson, Martell Lee, Rodney Palmer, Lennel Smith, Randy Teagus and Stanley Westmoreland: Jury trial held and continued to 5/15/95 at 9:30 a.m. Formal jury instruction conference held on the record with defendants present. No notice (dmk) [Entry date 05/12/95]

5/18/95 589 MINUTE ORDER of 5/18/95 by Hon. James F. Holderman as to Eddie Richardson, Carmen Tate, Sectric Curry, Kerry Dockery, Nate Hall, William Johnson, Martell Lee, Rodney Palmer, Lennel Smith, Randy Teagus and Stanley Westmoreland: Jury trial held and continued to 5/22/95 at 9:30 a.m. Closin [sic] statements concluded. Jury retires to deliberate the verdict. Trial adjourned; juy [sic] to separate. No notice (pp) [Entry date 05/19/95]

8/24/95 713 SENTENCING ORDER of 8/24/95 by Hon. James F. Holderman: Sentencing Eddie Richardson (1) count(s) 1, 2. The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoend [sic] for a term of Life on Count 1 and Count 2 to run concurrently with each other. Defendant

shall receive credit for time served beginning 03/23/94. Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years. The defendant shall pay a fine of $25,000.00. The fine includes any costs of incarceration and/or supervision. Statement of reasons. Mailed notice (dmk) [Entry date 08/28/95]

3/13/97 966 MOTION by Carmen Tate to supplement the record on appeal (pp) [Entry date 03/18/97]

3/17/97 967 SUPPLEMENTAL proposed jury instructions by Carmen Tate (pp) [Entry date 03/18/97]

3/18/97 968 MINUTE ORDER of 3/17/97 by Hon. James F. Holderman as to Carmen Tate: Granting defendant's motion to supplement the record on appeal. [966-1] Ther [sic] Clerk of the District is directed to supplement the record on appeal with "Tate's supplemental proposed instructions" forthwith. Mailed notice (pp) [Entry date 03/18/97]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	94CR0187
	)	Violations: Title 18,
v.	)	United States Code,
EDDIE RICHARDSON,	)	Section 371; Title 21,
also known as "Hi Neef"	)	United States Code,
and "Chief,"	)	Sections 846, 848
CARMEN TATE, also known	)	and 853
as "Red" and "Redman,"	)	
ANDRE CAL,	)	(Filed Mar. 23, 1994)
also known as "Dre"	)	
JOHNNIE CHEW,	)	
also known as "Little Johnnie,"	)	
SECTRIC CURRY,	)	
also known as "Super,"	)	
KERRY DOCKERY,	)	
also known as "Kayro,"	)	
ANTHONY ELLIOT,	)	
also known as "Pretty Boy,"	)	
NATE HALL,	)	
also known as "High Power,"	)	
LYDELL JOHNSON,	)	
also known as "Bo,"	)	
WILLIAM JOHNSON,	)	
also known as "Moyne,"	)	
MARTELL LEE,	)	
also known as "Tell,"	)	
RODNEY PALMER,	)	
also known as "Fat Rodney,"	)	
MICHAEL SARGENT,	)	
also known as "Big Mike,"	)	
THADDEUS SCOTT,	)	
also known as "Thad,"	)	

LENNEL SMITH,	)
also known as "Dusty,"	)
RANDY TEAGUS,	)
also known as "Seemo,"	)
KENNY TERREL,	)
also known as "Cannonball,"	)
JUANITA THOMAS,	)
DONALD TILLMAN,	)
also known as "Disco,"	)
JOSEPH WESTMORELAND,	)
also known as "Smoke," and	)
STANLEY WESTMORELAND,	)
also known as "Sleep" or	)
"General"	)

COUNT ONE

The SPECIAL APRIL 1993 GRAND JURY charges:

1. From in or about 1984 until in or about October 1991, at Chicago and elsewhere in the Northern District of Illinois, Eastern Division,

EDDIE RICHARDSON,
also known as "Hi Neef" and "Chief,"
CARMEN TATE,
also known as "Red" and "Redman,"
ANDRE CAL,
also known as "Dre"
JOHNNIE CHEW,
also known as "Little Johnnie,"
SECTRIC CURRY,
also known as "Super,"
KERRY DOCKERY,
also known as "Kayro,"
ANTHONY ELLIOT,
also known as "Pretty Boy,"
NATE HALL,
also known as "High Power,"

LYDELL JOHNSON,
also known as "Bo,"
WILLIAM JOHNSON,
also known as "Moyne,"
MARTELL LEE,
also known as "Tell,"
RODNEY PALMER,
also known as "Fat Rodney,"
MICHAEL SARGENT,
also known as "Big Mike,"
THADDEUS SCOTT,
also known as "Thad,"
LENNEL SMITH,
also known as "Dusty,"
RANDY TEAGUS,
also known as "Seemo,"
KENNY TERREL,
also known as "Cannonball,"
DONALD TILLMAN,
also known as "Disco,"
JOSEPH WESTMORELAND,
also known as "Smoke," and
STANLEY WESTMORELAND,
also known as "Sleep" or "General"

defendants herein, conspired and agreed with each other, and with others known and unknown to the Grand Jury, knowingly and intentionally to possess with intent to distribute and to distribute quantities of cocaine and cocaine base, Schedule II Narcotic Drug Controlled Substances, and heroin, a Schedule I Narcotic Drug Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1).

2. It was part of the conspiracy that defendants EDDIE RICHARDSON and CARMEN TATE obtained

wholesale quantities of mixtures containing cocaine, cocaine base and heroin for processing and resale.

3. It was further part of the conspiracy that defendants EDDIE RICHARDSON and CARMEN TATE controlled and directed a street gang named the Cicero Undertaker Vice Lords, also known as the "Undertakers." Defendants ANDRE CAL, JOHNNIE CHEW, SECTRIC CURRY, KERRY DOCKERY, ANTHONY ELLIOT, NATE HALL, LYDELL JOHNSON, WILLIAM JOHNSON, MARTELL LEE, RODNEY PALMER, MICHAEL SARGENT, THADDEUS SCOTT, LENNEL SMITH, RANDY TEAGUS, KENNY TERREL, DONALD TILLMAN, JOSEPH WESTMORELAND, and STANLEY WESTMORELAND were members or associates of the Undertakers.

4. It was further part of the conspiracy that the Undertakers were divided into "generations" of members. A generation consisted of a group of persons who were about the same age and became Undertakers at about the same time. Each generation had its own King, Prince and other officers who were answerable to defendants EDDIE RICHARDSON and CARMEN TATE. Defendant WILLIAM JOHNSON was the King of the second generation of Undertakers; defendant KERRY DOCKERY was the King of the third generation of Undertakers; and defendant JOSEPH WESTMORELAND was the King of the fourth generation of Undertakers.

5. It was further part of the conspiracy that defendants EDDIE RICHARDSON and CARMEN TATE provided the cocaine, cocaine base and heroin they obtained to the Undertakers and other narcotics distributors.

6. It was further part of the conspiracy that defendants sold user quantities of cocaine, cocaine base and heroin, typically in small packages, commonly referred to as "bags." Twenty or more "bags" were typically bundled into a "pack."

7. It was further part of the conspiracy that defendants and others sold these user quantities of cocaine, cocaine base and heroin in the area of the city of Chicago centered on Cicero Avenue north of the Eisenhower Expressway, an area sometimes called "the Graveyard" (hereinafter "Undertaker Territory"). The Undertakers also sold user quantities of these narcotics in various other areas on the West side of Chicago, as far east as Pulaski Road, as far west as Laramie Avenue, as far south as Taylor Street and as far North as Chicago Avenue.

8. It was further part of the conspiracy that defendants and others sold user quantities of cocaine, cocaine base and heroin, from various locations, also called "spots," within Undertaker Territory and elsewhere. These locations or "spots" included but were not limited to sidewalks, street corners and apartments.

9. It was further part of the conspiracy that at various times defendants ANDRE CAL, JOHNNIE CHEW, SECTRIC CURRY, KERRY DOCKERY, ANTHONY ELLIOT, NATE HALL, LYDELL JOHNSON, WILLIAM JOHNSON, MARTELL LEE, RODNEY PALMER, MICHAEL SARGENT, THADDEUS SCOTT, LENNEL SMITH, RANDY TEAGUS, KENNY TERREL, DONALD TILLMAN, JOSEPH WESTMORELAND, and STANLEY WESTMORELAND assumed various roles in connection

with the sale of cocaine, cocaine base and heroin, including mixing and packaging, cooking cocaine base, transporting the narcotics to the "spots," supervising and conducting narcotics sales from the "spots," collecting the proceeds of the narcotics sales, and transporting the proceeds from the "spots" to other Undertakers, including defendants EDDIE RICHARDSON and CARMEN TATE.

10. It was further part of the conspiracy that the sale of user quantities of cocaine, cocaine base and heroin in Undertaker Territory was subject to the approval of defendants EDDIE RICHARDSON and CARMEN TATE.

11. It was further part of the conspiracy that defendants EDDIE RICHARDSON and CARMEN TATE established and enforced rules relating to the sale of user quantities of cocaine, cocaine base and heroin in Undertaker Territory, which rules had the purpose and effect of maintaining the quality, profitability and reputation of such sales within Undertaker Territory.

12. It was further part of the conspiracy that defendants EDDIE RICHARDSON and CARMEN TATE enforced and caused the enforcement of the rules relating to the sale of user quantities of cocaine, cocaine base and heroin through a system of punishment known as "violations." A violation consisted of physical punishment of a nature and degree chosen and/or approved by defendants RICHARDSON or TATE or their designees.

13. It was further part of the conspiracy that defendant EDDIE RICHARDSON derived substantial profits from the sale of narcotics in Undertaker Territory and elsewhere, and that RICHARDSON used these profits to

purchase real estate (including 1025 Churchill, Bolingbrook, Illinois and 1720 N. Nagle, Chicago, Illinois), vehicles (including BMWs, Cadillacs, a Chevrolet Monte Carlo, a Jeep Wrangler, Jeep Cherokees, an Oldsmobile Toronado, and a blue Oldsmobile Trofeo), and other assets.

14. It was further part of the conspiracy that defendant CARMEN TATE derived substantial profits from the sale of narcotics in Undertaker Territory and elsewhere, and that TATE used these profits to purchase real estate (including 317 Drake, Bolingbrook, Illinois), vehicles (including BMWs, Cadillacs, and a black Oldsmobile Trofeo), and other assets.

15. It was further part of the conspiracy that defendants EDDIE RICHARDSON and CARMEN TATE used various means to conceal their narcotics proceeds from the Internal Revenue Service and the Drug Enforcement Administration, including avoiding the filing of income tax returns, making cash payments in amounts under $10,000, and using nominees to purchase and hold assets.

16. It was further part of the conspiracy that defendants did misrepresent, conceal and hide, and cause to be misrepresented, concealed and hidden the purposes of acts, and the acts, done in furtherance of the conspiracy, and did use means to avoid detection and apprehension by law enforcement authorities.

All in violation of Title 21, United States Code, Section 846.

COUNT TWO

The SPECIAL APRIL 1993 GRAND JURY further charges:

1. From in or about 1984, to and including October 1991, at Chicago and elsewhere in the Northern District of Illinois, Eastern Division,

EDDIE RICHARDSON,
also known as "Hi Neef" and "Chief," and
CARMEN TATE,
also known as "Red" and "Redman,"

defendants herein, did engage in a continuing criminal enterprise by committing a continuing series of felony violations of Sections 841(a)(1) of Title 21, United States Code, which continuing series of violations was undertaken by defendants in concert with at least five other persons with respect to whom defendants occupied a position as organizer, a supervisory position, and some other position of management, and from which continuing series of violations defendants obtained substantial income and resources.

2. The continuing series of violations undertaken by defendants EDDIE RICHARDSON and CARMEN TATE included:

a. From in or about 1984 through and including October 1991, at Chicago, in the Northern District of Illinois, Eastern Division, defendants EDDIE RICHARDSON and CARMEN TATE knowingly and intentionally repeatedly distributed and caused to be distributed cocaine and cocaine base and possessed cocaine and cocaine base with intent to distribute, in

violation of Title 21, United States Code, Section 841(a)(1).

b. From in or about 1984 through and including October 1991, at Chicago, in the Northern District of Illinois, Eastern Division, defendants EDDIE RICHARDSON and CARMEN TATE knowingly and intentionally repeatedly distributed and caused to be distributed heroin and possessed heroin with intent to distribute, in violation of Title 21, United States Code, Section 841(a)(1).

In violation of Title 21, United States Code, Section 848.

COUNT THREE

The SPECIAL APRIL 1993 GRAND JURY further charges:

1. Beginning in or about 1985 and continuing until in or about October 1991, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere,

CARMEN TATE,
also known as "Red" and "Redman," and
JUANITA THOMAS,

defendants herein, did knowingly agree and conspire with each other and with others known and unknown to the Grand Jury, to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of: (a) the Department of the Treasury, in particular the Internal Revenue Service, in the assessment and collection of financial information relating to cash transactions in excess of $10,000, useful in criminal, tax and regulatory

investigations; (b) the Internal Revenue Service and the Drug Enforcement Administration in the identification, seizure and forfeiture of property under the laws of the United States.

2. It was part of the conspiracy that in order to disguise from governmental authorities, including the Internal Revenue Service and the Drug Enforcement Administration, his purchase and ownership of certain real estate, cars and other property using funds derived from the sale of cocaine, cocaine base and heroin, defendant CARMEN TATE arranged for the purchase of real estate, cars and other property by breaking down cash payments into amounts less than $10,000 so that the cash payments would not be reported to the IRS.

3. It was further part of the conspiracy that in order to disguise from governmental authorities, including the Internal Revenue Service and the Drug Enforcement Administration, his purchase and ownership of certain real estate, cars and other property using funds derived from the sale of cocaine, cocaine base and heroin, defendant CARMEN TATE made purchases using the names of other individuals and caused the title to real estate and cars to be placed in the names of other individuals.

4. It was further part of the conspiracy that defendant CARMEN TATE did not file federal income tax returns for the tax years 1984 to the present and had no income reported on Forms W-2 to the Social Security Administration.

5. It was further part of the conspiracy that defendant JUANITA THOMAS made repeated deposits, including cash deposits of less than $10,000, into her bank

accounts for the purpose of disguising the source of funds used to purchase assets for CARMEN TATE.

6. It was further a part of the conspiracy that in or about February 1985, defendant CARMEN TATE purchased a white Cadillac El Dorado at Patrick Cadillac for a total price of $29,395. Defendant CARMEN TATE arranged for the Cadillac to be titled in the other person's name and paid the other person approximately $1,200 for his services.

7. It was further part of the conspiracy that in March and April 1985, defendants CARMEN TATE and JUANITA THOMAS used approximately $76,000 in cash to purchase the property at 317 Drake in Bolingbrook, Illinois. Defendants employed another person to arrange this purchase in such a way as to avoid the filing of forms with the IRS that would have disclosed the use of amounts of cash over $10,000. Defendant CARMEN TATE caused this property to be put in trust for his grandmother.

8. It was further part of the conspiracy that in August 1986, defendants CARMEN TATE and JUANITA THOMAS purchased a beige 1986 BMW model 735 at Patrick Cadillac/BMW for $39,436. Defendants TATE and THOMAS arranged to make the payments in the names of THOMAS and another person and arranged for the BMW to be titled in the other person's name.

9. It was further part of the conspiracy that from about September 1986 to about November 1986, defendants CARMEN TATE and JUANITA THOMAS arranged to purchase 46 N. 52nd Avenue, Bellwood, Illinois using cash and cashier's checks in amounts under $10,000.

Defendants TATE and THOMAS titled the property in the name of another person.

10. It was further part of the conspiracy that in or about December 1987, defendants CARMEN TATE and JUANITA THOMAS purchased a 1988 Jeep Cherokee at Naperville Jeep. Defendants TATE and THOMAS purchased the Cherokee using, in part, a car loan of approximately $16,800 from Clyde Federal Savings. Defendants subsequently made payments on the Cherokee loan to Clyde Federal Savings by purchasing cashier's checks with cash and by making cash deposits under $10,000 into defendant THOMAS' account at Great American Federal Savings, from which Thomas wrote personal checks.

11. It was further part of the conspiracy that in February 1990, defendant CARMEN TATE purchased a black 1990 Oldsmobile Toronado Trofeo and arranged for this car to be titled in the name of defendant JUANITA THOMAS.

12. It was further part of the conspiracy that in June 1990, defendants CARMEN TATE and JUANITA THOMAS purchased a silver 1990 Cadillac Allante in the name of Juanita Thomas. Defendants purchased the 1990 Allante using $9,000 cash, a $5,000 cashier's check purchased with cash and a used 1988 maroon Cadillac Allante.

13. It was further part of the conspiracy that defendant CARMEN TATE purchased other real estate (including 3000 W. Monroe in Bellwood, Illinois), cars and property which he caused to be titled in the names of

other individuals so as to conceal his purchase and ownership of the other real estate, cars and property from governmental authorities, including the Internal Revenue Service and Drug Enforcement Administration.

14. It was further part of the conspiracy that the defendants would and did misrepresent, conceal and hide and cause to be misrepresented, concealed and hidden, the purposes of the acts done in furtherance of the conspiracy.

OVERT ACTS

15. In furtherance of the conspiracy and to effect the objects thereof, the defendants committed or caused to be committed the following overt acts:

a. On or about February 6, 1985, defendant CARMEN TATE had a meeting at Patrick Cadillac in Schaumburg, Illinois relating to the purchase of a white Cadillac El Dorado.

b. On or about March 21, 1985, defendants CARMEN TATE and JUANITA THOMAS signed a contract to purchase 317 Drake, Bolingbrook, Illinois.

c. On or about March 26, 1985, defendant CARMEN TATE deposited $10,000 cash with a realtor as earnest money towards the purchase of 317 Drake, Bolingbrook, Illinois.

d. In or about March and April 1985, defendant CARMEN TATE made cash payments to a realtor for use in the purchase of 317 Drake, Bolingbrook, Illinois.

e. In or about August 1986, defendant JUANITA THOMAS asked another person to purchase a car for THOMAS in the other person's name.

f. In or about August 1986, defendant JUANITA THOMAS made cash payments at Patrick Cadillac/BMW in connection with the purchase of the beige 1986 BMW model 735.

g. On or about September 12, 1986, defendant JUANITA THOMAS provided a $1,000 check to Davies Realty as part of the purchase price of 46 N. 52nd Avenue, Bellwood, Illinois.

h. On or about December 16, 1987, defendant JUANITA THOMAS signed the bill of sale for a 1988 Jeep Cherokee.

i. On or about May 25, 1988, defendant JUANITA THOMAS signed the bill of sale and title application for a 1988 Cadillac Allante.

j. On or about November 17, 1988, defendant JUANITA THOMAS purchased with cash a $5,000 cashier's check to be used in connection with the purchase of a 1989 Cadillac Seville.

k. In or about February 1990, defendant CARMEN TATE told a car salesman to title a black 1990 Oldsmobile Toronado Trofeo in the name of his girlfriend, Juanita Thomas.

l. In or about February 1990, defendant Juanita Thomas purchased two $5,000 cashier's checks from Great America Federal Savings, which checks were used toward the purchase of black 1990 Oldsmobile Toronado Trofeo.

m. On or about June 2, 1990, defendant JUANITA THOMAS purchased a $5,000 cashier's check with cash from Great America Federal Savings and signed a title application for the silver 1990 Cadillac Allante.

In violation of Title 18, United States Code, Section 371.

FORFEITURE ALLEGATION

1. The SPECIAL APRIL 1993 GRAND JURY realleges Counts One and Two of this indictment as though fully set herein.

2. The SPECIAL APRIL 1993 GRAND JURY further charges that beginning in about 1984 and continuing until at least October 1991, defendants EDDIE RICHARDSON, also known as "Hi Neef" and "Chief," and CARMEN TATE, also known as "Red" and "Redman," did engage in conduct in violation of Title 21, United States Code, Sections 846 and 848, thereby subjecting to forfeiture to the United States, pursuant to Title 21, United States Code, Section 853(a), certain property, including but not limited to the following property and interests:

a. All property constituting or derived from the proceeds the defendants obtained, directly or indirectly, as a result of their violations of Title 21, United States Code, Sections 846 and 848;

b. All property used and intended to be used in any manner or part to commit or facilitate the commission of, their violations of Title 21, United States Code, Sections 846 and 848.

Specifically, such property includes approximately $2,000,000 in United States Currency, in that such sum in aggregate was received in exchange for the distribution of controlled substances, including cocaine, cocaine base and heroin, or is traceable thereto, for which the defendants are jointly and severally liable.

3. If any of the property described as being subject to forfeiture pursuant to Title 21, United States Code, Section 853(a), as a result of any act or omission of the defendants –

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third person;

(3) has been placed beyond the jurisdiction of the Court;

(4) has been substantially diminished in value, or;

(5) has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of said defendants up to the value of said property forfeitable in paragraph (1) above.

In violation of Title 21, United States Code, Section 853.

A TRUE BILL:

_____

FOREPERSON

_____

UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[Caption Omitted In Printing]

Title 21 U.S.C. § 848

TATE'S PROPOSED INSTRUCTION NO. 22

To sustain the charge of engaging in a continuing criminal enterprise against Eddie Richardson and Carmen Tate, the government must prove the following propositions with respect to the defendant you are considering:

First, that the defendant you are considering committed at least three violations of the federal narcotics offenses alleged in Count Two of the indictment. You must unanimously agree on which three acts constituted series of violations;

Second, that the defendant committed the offenses acting in concert with five or more other persons. You must unanimously agree on the five persons with whom the defendant committed the violations;

Third, that the defendant acted as an organizer, supervisor or manager of five or more persons; and

Fourth, the defendant obtained substantial income or resources from the offenses.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt with respect to the defendant you are considering, then you should find him guilty of Count Two.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt with respect to the defendant you are considering, then you should find him not guilty of Count Two.

_____ Given

_____ Given as Modified

_____ Refused

_____ Refused as Covered

_____ Withdrawn

United States v. Baker, 10 F. 3d 1374, 1408 (9th Cir. 1993)

United States v. Echeverri, 854 F. 2d 638 (3rd Cir. 1988)

Title 21 U.S.C. § 848

TATE'S PROPOSED INSTRUCTION NO. 23

If you find beyond a reasonable doubt, that the government has proved that the defendant committed a continuing series of at least three or more federal narcotics offenses alleged in Count Two, you must also decide whether the defendant committed this series of offenses acting in concert with five or more persons.

Those persons do not have to be named in the indictment.

You must unanimously agree on which three acts constituted series of violations;

You must unanimously agree on the five persons with whom the defendant committed the violations;

_____ Given

_____ Given as Modified

_____ Refused

_____ Refused as Covered

_____ Withdrawn

United States v. Baker, 10 F. 3d 1374, 1408 (9th Cir. 1993)

United States v. Echeverri, 854 F. 2d 638 (3rd Cir. 1988)

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

EXCERPTS FROM TRIAL TRANSCRIPT
UNITED STATES v. EDDIE RICHARDSON, et al.
94 CR 187

[Caption Omitted In Printing]

TRANSCRIPT OF INSTRUCTION CONFERENCE

* * *

[5151] been substituted – well, 29-A, and Tate Instruction No. 5 was the compromise that was reached. I object to the instruction. It has to do with the government's use of cooperating individuals and undercover agents. Your Honor has told the jury during the trial that these are legal means of criminal investigation. I don't believe it should be highlighted in the final word that the jury gets. It seems to me that it gives some sort of an imprimatur to the government's activities, and I think it's inappropriate.

30 and 31 – actually, it's 30-A and 31 – they're on the same page – they were moved into the instructions regarding continuing criminal enterprise right after Government Instruction 39-A. I'd object to the first paragraph, which I guess is 30-A, on the grounds that it is covered by 31, which is also being given, and under the facts of this case, Instruction 31 is the only way in which there was any evidence that Mr. Richardson might have participated in a crime other than as a direct participant.

I object to Government Instruction 46-A and 46-B, which are the unanimity instructions with respect to the continuing criminal enterprise, and I object to the refusal of Tate Instruction No. 22, which I believe –

THE COURT: Counsel may confer.

(Counsel conferring.)

THE COURT: Off the record.

[5152] (Discussion off the record.)

THE COURT: Back on the record.

MR. BARNETT: In addition, Tate proposed Instruction No. 22 will be submitted, and I object to the refusal of that instruction. That would take the place of No. 39-A, as well as No. 46-A and 46-B, and, more appropriately state the law as I believe that it should be. Other than that, I do not have an objection to 39-A, however.

No. 57, which I'm not finding here, but my note is No. 57 is to be given if the defense raises the argument – it's not in the package that's before you –

THE COURT: Yes, is that in a separate –

MR. KRULEWITCH: We'll resubmit that, your Honor. 57-A, I believe it was.

MS. SCOTT: Is that the punishment instruction?

THE COURT: Yes, that's the punishment instruction from the 6th Circuit. It's not in the packet and should not be in the packet, because I don't anticipate giving that unless there is some argument that prompts the need to apprise the jury that it is not the jury's consideration.

MR. BARNETT: All right. I would object to it if it does end up being given, and I would object to having it held over our heads.

THE COURT: All right, I understand your position [5153] on that.

MR. BARNETT: No. 62-A, I don't have an objection to that, but I do have an objection to your refusal of Teagus 1, which I believe is going to be submitted as part of the submissions of refused instructions.

THE COURT: Yes, let me just articulate so the record is clear and so if there's a review I don't want anyone to misinterpret.

All of the instructions that have been submitted and refused at the informal instruction conference, I have requested counsel to resubmit those instructions which they are objecting to the refusal thereof, so that when you say that it will be submitted, it actually already has been submitted and it's been refused off the record and it will be submitted to be made a part of the record. I didn't want any reviewing judge to believe that somehow it wasn't previously submitted, because it was.

You may proceed.

MR. BARNETT: Other than those instructions, Judge, from my notes, I believe that's all I have any objections to. If, during the course of other counsel making their presentations, something arises, I'd ask leave to address the Court again at the end of this, but I don't anticipate that happening.

THE COURT: All right, well, I understand, and, [5154] again, if other counsel make objections that you do not disavow, they inure to the benefit of Mr. Richardson.

MR. BARNETT: Thank you, Judge.

THE COURT: There is one thing I want to mention with each defense counsel, and that is off the record you had indicated you needed three-quarters of an hour. That would be the maximum time that I could accord, or I believe should be accorded.

Do you believe you can do it with less than that?

MR. BARNETT: I don't think so, Judge.

THE COURT: All right, three-quarters of an hour, then, is the allotted amount.

All right, on behalf of the defendant Carmen Tate.

MS. RIVKIN-CAROTHERS: Your Honor, basically, I think that Mr. Barnett covered the objections that we have, but in addition to his comments relative to 39-A and 30-A and 31-A, regarding Tate's proposed Instruction No. 22, we also object to not being allowed to have special interrogatories so that the jury would be required to indicate which three acts they were considering, as well as identifying specifically the five individuals that they had considered in those matters.

Along the same line, we object to 46-A and [5155] 46-B, also because of – based on Tate's proposed Instruction No. 23.

THE COURT: All right, so the record should accurately reflect that you object to the refusal of Tate 23, as well.

MS. RIVKIN-CAROTHERS: Yes.

THE COURT: All right, let me comment on those. I'm refusing Tate 22 and Tate 23 because I believe

the law in the 7th Circuit does not require such a finding. I'm also refusing any proposed special interrogatories that would require the jury to make such a finding. I understand the 7th Circuit law may differ from that of the 9th Circuit, but I believe that the 7th Circuit law is accurately reflected in the instructions that will be given.

All right, as to the other objections that were made previously by counsel – well, let me just comment on a couple of those so that the record is clear, and if counsel want to comment further, they may, but with regard to Government Instruction No. 5, which is 7th Circuit Committee 1.05, I believe that it accurately states the jury's assessment and what the jury should not assess and what should not regard. Counsel may certainly argue that the government failed to prove what the government said it was going to prove in the opening statement, and remind the jury of what the government said in the opening statement.

* * *

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

EXCERPTS FROM TRIAL TRANSCRIPT
UNITED STATES v. EDDIE RICHARDSON, et al.
94 CR 187

[Caption Omitted In Printing]

TRANSCRIPT OF GOVERNMENT ARGUMENT

* * *

[5377] you is consistent with what was up there, but your recollection is what governs.

Moreover, the Court will tell you to disregard opening statements and closing arguments and other statements of counsel to the extent that they're not supported by evidence. And in opening statements, Ms. Scott indicated that the government might call other witnesses – Anthony Elliot and Kenny Terrel. To the extent we did not call those witnesses and her comments were not supported by the evidence, please disregard those comments. Like the Court, the government asks you to reach your verdict on the evidence presented in this case and nothing else.

And that evidence demonstrates the guilt of every single man. The fact that there is more evidence against some of the defendants is not the relevant inquiry. This is not a comparative where you're scoring who is the most guilty. The only question on each individual defendant is: Has the government sustained the burden beyond a reasonable doubt that he is guilty of the count in Charge 1?

And I submit to you that the evidence with respect to each and every defendant has met that burden.

I'm almost done. I'm going to get to the last two counts of the indictment. I know – I appreciate your hearing with me. It's been a long argument.

Count 2 of the indictment charges Carmen Tate and [5378] Eddie Richardson alone with operating a continuing criminal enterprise, which means essentially they were the leaders and the organizers of the drug operation.

To establish their involvement in that charge, the government must prove four things beyond a reasonable doubt: One, that they committed a series of three or more drug crimes; two, they committed the drug crimes together with five or more persons; three, they were supervisors or organizers of those same five people; and, fourth, that they gained substantial resources from that – made a lot of money, got a lot of drugs.

The two crimes we're talking about are possession of cocaine or heroin with intent to distribute it and the distribution of heroin and cocaine.

Now, with respect to this charge only, Judge Holderman will instruct you that Richardson and Tate don't have to have personally possessed or distributed the drugs. It's enough that they caused other people to do it or that they directed other people to do it.

Thus, for example, if Eddie Richardson and Carmen Tate had Michael Sargent or Martell Lee pass out packs of heroin at Congress and Cicero, they are responsible for those activities. Each time Nate Hall and Rodney Palmer

sold rock cocaine from the beef stand, that's a distribution that was ordered by Eddie Richardson and Carmen Tate and Eddie [5379] Richardson and Carmen Tate are responsible for that.

Now, with respect to those four elements, the evidence overwhelmingly shows it. A continuing series of three. What we are talking about in this case is literally thousands of independent drug transactions. Every time an individual $20 bag of heroin was sold, every time an individual $10 bag of rock cocaine was sold, that is a separate drug crime. And you literally had a series of thousands, and you can rely upon any of those three in reaching your verdict.

Thus, the government has shown a continuing series of literally thousands and the first element with respect to both defendants. Carmen Tate's distribution of powder cocaine at Congress and Cicero. Carmen Tate's distribution of Heroin at Laramie and Van Buren. Eddie Richardson's distribution of heroin at Congress and Cicero. And all throughout Undertaker land, he is responsible for all of that.

Now, with respect to the second element, the evidence is, again, easily shown that both of these men supervised – five? They supervised way more than five men. The evidence has demonstrated the organizational structure of this business involved far more than five that were supervised or organized by Tate and Richardson. Consider the workers. Consider the runners. It's way more than five people.

Each time they called a violation, each time they

* * *

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

EXCERPTS FROM TRIAL TRANSCRIPT
UNITED STATES v. EDDIE RICHARDSON, et al.
94 CR 187

[Caption Omitted In Printing]

TRANSCRIPT OF JURY CHARGE

* * *

[5781] in Count 1 is an essential element of the crime. Evidence of intoxication from the use of drugs may be sufficient to create a reasonable doubt as to whether the defendant Nate Hall was able to form the requisite intent to commit the crime charged.

Mere addiction to drugs is not a defense to the charge of narcotics conspiracy. However, evidence of intoxication from the use of drugs at the time of the commission of the crime may be sufficient to create a reasonable doubt as to whether the defendant knowingly and intentionally committed the crime charged.

One of the issues in this case is whether the defendant Nate Hall was coerced. A defendant who was coerced must be found not guilty. If the defendant committed the offense charged only because he reasonably feared that immediate serious bodily harm or death would be inflicted upon him if he did not commit the offense and he had no reasonable opportunity to avoid the injury, then he was coerced.

In Count 2 of the indictment, members of the jury, the defendants Eddie Richardson and Carmen Tate are

charged with engaging in a continuing criminal enterprise. Title 21 United States Code section 848 provides, and I quote:

> "Any person who engages in a continuing [5782] criminal enterprise commits a separate offense against the United States."

To sustain the charge in Count 2 of the indictment of engaging in a continuing criminal enterprise against Eddie Richardson and Carmen Tate, the government must prove the following propositions with respect to the defendant you are considering:

> First, that the defendant committed a continuing series of at least three or more of the federal narcotics offenses alleged in Count 2 and at least one of the federal narcotics offenses occurred after the date of March 24, 1989;
>
> Second, that the defendant committed the offense acting in concert with five or more other persons;
>
> Third, that the defendant acted as an organizer, supervisor, or manager of five or more other persons; and
>
> Fourth, that the defendant obtained substantial income or resources from the offenses.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt with respect to the defendant you are considering, then you should find him guilty of Count 2.

If, on the other hand, you find from your consideration of all the evidence that any of these [5783] propositions has not been proved beyond a reasonable doubt with respect to the particular defendant you are considering, then you should find him not guilty of Count 2.

With respect to Count 2, a defendant need not personally perform every act constituting the crime charged. Every person who willfully participates in the commission of a crime may be found guilty. Whatever a person is legally capable of doing, he can do through another person by causing that person to perform the act. If the acts of another are willfully ordered, directed, or authorized by the defendant, then the defendant is responsible for such acts as though the defendant personally committed them.

Title 21 United States Code Section 841(a)(1) provides in relevant part, and I quote Section (a):

> "It shall be unlawful for any person knowingly or intentionally – subsection 1 – to distribute or possess with intent to distribute a controlled substance."

The federal narcotics offenses you may consider in determining whether the defendant engaged in a continuing criminal enterprise include, one, possession of a controlled substance with intent to distribute it, or, two, distributing or causing to be distributed, or aiding and abetting the distribution of, a controlled substance.

[5784] To establish that a defendant you are considering in Count 2 possessed the controlled substance with intent to distribute it, the government must prove the following propositions:

First, that the defendant knowingly or intentionally possessed the controlled substance;

Second, the defendant possessed the controlled substance with the indent [sic] to distribute it; and

Third, the defendant knew the substance was a controlled substance.

Possession may be actual or constructive. Constructive possession is the ability to control the controlled substance.

To establish that the defendant you are considering in Count 2 distributed a controlled substance, the government must prove the following propositions:

First, the defendant distributed a controlled substance;

Second, the defendant did so knowingly and intentionally; and

Third, the defendant knew the substance was a controlled substance.

Distribution is the transfer of possession from one person to another. You must unanimously agree that the defendant acted with and supervised, managed, or [5785] organized five or more persons within the time period charged in the indictment in committing the series of offenses. You do not, however, have to agree on the identity of the five persons with whom the defendant acted, that the five or more persons acted together at the same time, that the defendant personally dealt with them, or that the defendant had the same relationship with each of the five or more persons.

You must unanimously agree that the defendant committed at least three federal narcotics offenses. You do not, however, have to agree as to the particular three or more federal narcotics offenses committed by the defendant.

When the term "substantial" income or resources is used within these instructions, the term, quote, "substantial," close quote, means, quote, "of real worth or importance or of considerable value," close quote. When – the term "resources" is to be interpreted according to its ordinary, contemporary, and common meaning. Money or drugs are both resources within the meaning of the statute. The element of substantial income or resources may be proved through the use of circumstantial evidence.

The terms, quote, "organizer," "supervisor," – oh, let me read that again.

The terms "organizer," "supervisory position," and "any other position of management" are used [5786] in their ordinary meaning in these instructions.

You are instructed, members of the jury, that, as a matter of law, that heroin, cocaine, and cocaine base are controlled substances within the meaning of the statute.

In Count 3 of the indictment defendant Carmen Tate is charged with conspiring to defraud the United States. Title 18 United States Code Section 371 provides in pertinent part, and I quote:

"If two or more persons conspire to defraud the United States or any agency thereof in any manner or for any purpose and one or more of such persons do any act to effect the object of

the conspiracy, each person commits an offense against the laws of the United States."

To sustain the charge of conspiring to defraud the United States in Count 3 the government must prove the following propositions:

First, that the alleged conspiracy to defraud the United States existed;

Second, that an overt act was committed in furtherance of the conspiracy; and

Third, that an overt act – and, third, – I apologize – and third – the third element is that the defendant knowingly and intentionally became a member of the conspiracy.

* * *

United States District Court
NORTHERN District of ILLINOIS-EASTERN DIVISION

UNITED STATES OF AMERICA V. EDDIE RICHARDSON A/K/A Hi Neef, Chief (Name of Defendant)	**JUDGMENT IN A CRIMINAL CASE (For Offenses Committed On or After November 1, 1987)** Case Number: 94 CR 187-1 William A. Barnett, Jr. Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____.
[X] was found guilty on count(s) one and two after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which invole the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21:846	Conspiracy to possess with intent to distribute cocaine		1
21:848	Continuing criminal enterprise		2

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

[XX] It is ordered that the defendant shall pay a special assessment of $ 100.00, for count(s) one and two, which shall be due [X] immediately [ ] as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 353-50-3057	August 24, 1995 Date of Imposition of Sentence
Defendant's Date of Birth: 2/27/56	/s/ James F. Holderman Signature of Judicial Officer
Defendant's Mailing Address: 71 W. Van Buren St. Chicago, Illinois 60605	JAMES F. HOLDERMAN, U.S. DISTRICT JUDGE Name & Title of Judicial Officer
Defendant's Residence Address: 206 N. Keeler 1st Floor Chicago, Illinois 60624	August 24, 1995 Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Life on Count 1 and Count 2 to run concurrently with each other.

Defendant shall receive credit for time served beginning March 23, 1994.

[X] The court makes the following recommendations to the Bureau of Prisons:

that defendant be incarcerated in a Federal Correctional Institution in an area where defendant may still have contact with his family.

[ ] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.

[ ] at ___ a.m./p.m. on _____.
[ ] as notified by the United States marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

[ ] before 2 p.m. on _____.
[ ] as notified by the United States marshal.
[ ] as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not legally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

The defendant shall report in person to the probation office in the district to which the defendant is released

within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

The defendant shall not possess a firearm or destructive device.

Defendant shall not possess any controlled substances.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

the defendant shall not leave the judicial district without the permission of the court or probation officer;

the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

the defendant shall support his or her dependents and meet other family responsibilities;

the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine of $ 25,000.00. The fine includes any costs of incarceration and/or supervision.

[X] This amount is the total of the fines imposed on individual counts, as follows:

$25,000.00 on each of counts 1 and 2 to run concurrently with each other.

[X] The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

[XX] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

This fine plus any interest required shall be paid:

[ ] in full immediately.
[ ] in full not later than _____.
[ ] in equal monthly installments over a period of ____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.
[X] in installments according to the following schedule of payments:

while incarcerated through the Inmate Financial Responsibility Program.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

STATEMENT OF REASONS

[X] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 44

Criminal History Category: III

Imprisonment Range: life to _____ months

Supervised Release Range: 3 to 5 years

Fine Range: $ 25,000.00 to $ 6,000,000.00

[X] Fine is waived or is below the guideline range because of the defendant's inability to pay.

Restitution: $ N/A

[ ] Full restitution is not ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[X] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

The court believes that the sentence imposed reflects consideration of the proper sentencing factors.

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

_____

DECISION UNDER REVIEW
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES v. EDDIE RICHARDSON, et al.,
NO. 95-3053
130 F.3D 765

In The
United States Court of Appeals
for the Seventh Circuit

Nos. 95-3053, 95-3054, 96-2551, 96-2587, 96-2591, 96-2644, 96-2682, and 96-3197

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

EDDIE RICHARDSON, CARMEN TATE,
RODNEY PALMER, NATE HALL,
STANLEY WESTMORELAND, MARTELL LEE,
SECTRIC CURRY, and LENNEL SMITH,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinios, Eastern Division.
No. 94 CR 187 – **James F. Holderman**, *Judge.*

ARGUED SEPTEMBER 19, 1997 – DECIDED NOVEMBER 14, 1997

Before BAUER, RIPPLE, and EVANS, Circuit Judges.

EVANS, *Circuit Judge*. It wasn't Alice's Restaurant, but starting in 1990, if it was crack you wanted, you could get it at Highway Beef, a stand at the corner of Gladys and Cicero on the west side of Chicago. During the late

1980's, if it was heroin you wanted, you could get it two blocks away at the Courtway Building on Congress at Cicero. And all the dope came courtesy of a conspiracy involving members of a street gang with a charming name – the Undertaker Vice Lords. The gang operated around Cicero Avenue, near the point where it is bisected by the Eisenhower Expressway.

The operation was put out of business, and on March 23, 1994, a three-count indictment was filed charging conspiracy to distribute narcotics, in violation of 21 U.S.C. § 846; charging two leaders – Eddie Richardson and Carmen Tate – with engaging in a continuing criminal narcotics enterprise, in violation of § 848; and charging Tate and another person with conspiracy to defraud the United States, in violation of 18 U.S.C. § 371. A jury trial in the district court involving a gaggle of defendants ran from March 29, 1995, until May 23, 1995, before Judge James F. Holderman; the eight defendants currently before us were found guilty on all the charges against them, although three others who went to trial were acquitted. In addition, one alleged gang member was convicted in a separate trial and several others entered guilty pleas. Sentencings were held over a 1-year period from August 1995 until August 1996. Sectric Curry, Nate Hall, Richardson, and Tate received life imprisonment; Martell Lee and Stanley Westmoreland received 324 months; Rodney Palmer received 292 months, and Lennel Smith 194 months, sentences which vividly show how much society's attitudes about drugs have changed since Alice's time.

The Undertaker Vice Lords were formed in the 1970's by Eddie Richardson. The gang was organized in a hierarchy with five groups of members called "generations"; members of each generation were people of roughly the same age who joined the gang at roughly the same time. Each generation had its own "King" and "Prince." Richardson was the "King of all the Undertakers" and a "Universal Elite" within the Vice Lord Nation. Tate had no rank but was a member whom, it is said, all Undertakers looked up to. The alleged conspirators in this case came from several of the generations and some were leaders of their generations. Richardson was the one who designated who would be a leader. Two members of the fourth generation, Michael Sargent and Johnnie Chew, and a member of the fifth generation, Andre Cal, pled guilty and testified for the government at trial.

The government alleged that Richardson not only controlled the gang but also oversaw the distribution of heroin, crack cocaine, and powder cocaine. Richardson and Tate were said to permit only members of the Undertakers and others granted permission by them to sell drugs in the Undertakers territory. The drugs were sold at well-established drug "spots," and there were established locations for preparing and packaging the drugs. A Chicago Police Department search of one of the latter locations in June 1985 uncovered a kilogram of heroin, irons, mixing bowls, blenders, and strainers. During the search Tate asked the police to let everyone else go because the heroin belonged to him; he said that he bagged it himself because he did not trust his workers. From the packaging locations, runners delivered the drugs to the drug spots and collected the money, and the

workers then sold the drugs. Richardson and Tate enforced the rules regarding drug sales by a system of punishments called "violations." The violations ranged from not being allowed to continue selling, to beatings with bricks, bottles, or ax handles, being stabbed or shot, and even, at least once, to being killed.

The sale of heroin was the primary object of the conspiracy from 1984 until 1990. From 1984 until 1987 brown heroin was distributed out of the Courtway Building in packs which contained 25 $25 packets of user quantities of heroin. For each pack sold, the workers were paid $100, and Richardson and Tate received the balance. From the winter of 1987 until the end of 1988 Chew ran the heroin spot in the Courtway Building. He estimated that during that time, the Undertakers sold a "frame" – 25 packs of 25 bags – every 3 to 4 days, or approximately 25 kilograms of brown heroin. Others selling brown heroin from the Courtway Building included Hall and Westmoreland. Smith also admitted to selling heroin for Richardson and Tate at Cicero and Van Buren and Laramie and Van Buren and, in a tape-recorded conversation, he said he worked for Tate and Richardson from 1985 to 1988, making about $50,000.

In the fall of 1988 Richardson and the Undertakers began to distribute white heroin from the Courtway Building. Chew initially was the runner, followed by Darryl Joyner, Lee, and Sargent. Lee was arrested in January 1989 carrying $2,700 in cash and a beeper. After the arrest, Sargent assumed Lee's responsibilities; Richardson provided Sargent with an average of $40,000 to

$60,000 worth of heroin three times a week. Joseph Westmoreland, who was convicted in a separate trial, estimated that the conspiracy was collecting about $20,000 to $30,000 per day. Based on these statements, the Undertakers sold slightly more than 100 kilograms of white heroin between 1988 and 1990.

Others were also involved in the heroin operation. Curry sold heroin while Sargent was the runner; in fact, Sargent considered Curry his best worker. Curry was arrested in August 1989 and, in a tape-recorded conversation, told an agent that he made more than $50,000 selling drugs for Richardson and Tate. Hall sold heroin from the Courtway Building from May 1988 until December 1988. In a June 1991 conversation with a government agent, Hall confirmed that he was selling heroin for Richardson and that he had been working for Tate and Richardson since 1983. He claims he made approximately $60,000. Lee also was involved in the white heroin trafficking. On October 9, 1990, and November 24, 1990, Lee sold an agent 19 $20 bags of white heroin.

In November 1990 the Undertakers branched into the distribution of crack, primarily from the beefstand at the corner of Gladys and Cicero. Cal testified that he and Tate cooked a quarter kilo of cocaine into crack two to three times a week for 10 months. That would mean that during that time, they sold over 25 kilograms of crack. Curry, Hall, Lee, Palmer, Smith, and Westmoreland each participated in the sale of crack at the beefstand.

Richardson and Tate also oversaw the distribution of powder cocaine. In 1988 Chew became a runner for

cocaine. In addition, Hall, Curry, and Lee were involved in the cocaine operation.

The conspiracy was uncovered when, beginning in 1988, John Rotunno, an agent with the Bureau of Alcohol, Tobacco & Firearms, began an undercover investigation into an illegal gun trade on the west side. In August 1990 he abandoned that investigation and began looking into narcotics sales and street gangs. Posing as the brother of confidential informant Debra Schwede, Rotunno said he was a large marijuana dealer from California who had been arrested by the DEA and was currently on parole. He began to make small purchases of narcotics from low-level members of the gang, who then cooperated with the government.

The facts just recited have been, as required, viewed in the light most favorable to the government. The defendants don't agree. First, they say, this was not one big conspiracy with a monopoly on the Cicero Avenue drug trade. To the extent the defendants sold drugs, they claim to have sold them as members of several smaller conspiracies. Being a member of the Undertakers, they say, does not make one a member of an overarching drug conspiracy. That there is a variance between the indictment and the proof – that is, that there were several smaller conspiracies rather than one large one – is not a novel argument in drug cases, and the law is well-established. We will summarize briefly.

A contention that there were several conspiracies, rather than the one charged, amounts to a "challenge to

the sufficiency of the evidence supporting the jury's finding that each defendant was a member of the same conspiracy." *United States v. Townsend*, 924 F.2d 1385, 1389 (7th Cir.1991). The court considers the evidence in the light most favorable to the government, defers to the credibility findings of the jury, and overturns a verdict only when the record contains no evidence from which the jury could find guilt beyond a reasonable doubt. *United States v. Hickok*, 77 F.3d 992 (7th Cir.), *cert. denied*, 116 S.Ct. 1701 (1996).

A conspiracy is a combination of two or more persons joined to further a common purpose or design. *United States v. Shorter*, 54 F.3d 1248 (7th Cir.), *cert. denied*, 116 S. Ct. 250 (1995). To establish that an individual was a member of a conspiracy the government must prove that the individual knew of the conspiracy and intended to join and associate himself with its criminal design and purpose. *United States v. Auerbach*, 913 F.2d 407 (7th Cir.1990). The government need only prove the existence of the conspiracy and a participatory link with each defendant. *United States v. Caudill*, 915 F.2d 294 (7th Cir.1990). The scope of the conspiracy is determined by the scope of the agreement between the defendants. The government must show that a defendant joined the agreement, not the group. The defendant need not have known all the other conspirators nor have participated in every aspect of the conspiracy. A key question is whether the defendants had a mutual interest in achieving the goal of the conspiracy.

The question whether there is one conspiracy or several is a question of fact, which is "something especially within the jury's realm of expertise," and for that reason

the jury "gets first crack" at deciding the issue. *United States v. Paiz*, 905 F.2d 1014, 1019 (7th Cir.), *cert. denied*, 499 U.S. 924 (1990). If the jury is properly instructed on the possible existence of multiple conspiracies, the "finding of a single conspiracy must stand unless the evidence taken in the light most favorable to the government, would not allow a reasonable jury so to find." *United States v. Mealy*, 851 F.2d 890, 898 (7th Cir.1988), quoting *United States v. Urbanik*, 801 F.2d 692, 695 (4th Cir.1986).

It is not relevant that the evidence might also be consistent with an alternate theory; say, that there were multiple conspiracies. Even if the evidence could arguably establish multiple conspiracies, there is no material variance from an indictment charging a single conspiracy. *See Townsend* at 1389.

Applying these principles to this case, we will briefly mention a few minor points raised by the defendants, which need not detain us long. First is the claim that the government somehow confused membership in the Undertakers with an agreement to join the conspiracy. We agree, of course, that the important point is not whether the defendants were Undertakers, nor whether they sold drugs. That they were Undertakers who sold drugs is virtually conceded. The issue is whether they sold drugs as members of the charged conspiracy. There must be evidence that they did if the convictions are to be sustained. We will return in a moment to the question of the sufficiency of the evidence.

Secondly, we note that there is no challenge to the jury instructions which were given, and those instructions properly included instructions – in fact, the defendants' proposed instructions – as to the possibility of multiple conspiracies. The jury was properly instructed and returned its verdict that the eight individuals before us – though not the three it acquitted – were members of one overarching conspiracy. That determination is within the jury's realm of expertise.

Third, the multiple versus single conspiracy issue – which dominates the defendants' arguments – is premised, in part, on the characterization of the government's approach in this case as spinning a huge web and dragging in all sorts of undeserving people. To some degree the argument is one which invokes a sympathetic response. Curry, for instance, was portrayed as a pathetic addict, selling to meet his own needs.

But the argument loses some of its zip when we look at what exactly this conspiracy was all about. It was – as the indictment alleges – a conspiracy to sell on the street, user quantities of narcotics. Except for the leaders, Richardson and Tate, it appears that everyone was, in one way or another, simply a street seller or runner. This indictment did not attempt to show a far-ranging conspiracy involving the importers, the couriers who brought the drugs to Chicago, or the sources from whom Richardson and Tate obtained the drugs. This is a localized, neighborhood operation. What makes it large is the length of time it existed and, partly because of the length of time, the large quantities of drugs distributed. But in some sense, this conspiracy is a small part of what might be a much larger conspiracy.

Having made those preliminary remarks, we turn to the issue at hand. Does the evidence support the existence of one conspiracy? What exactly is the defendants' argument that the evidence is suspect? What was the scope of the agreement? Did the defendants have a mutual interest in achieving a goal?

There seems to be little question that the conspiracy existed from 1984 until 1991 and had three objectives: monopolizing the sale of heroin; monopolizing the sale of crack in 1990 and 1991; and controlling who sold cocaine in Undertaker territory. Each of the defendants had agreements with other members of the group. They worked together as runners and workers to distribute drugs for Richardson and Tate. They worked specific, established spots where drugs were sold. They received a portion of the proceeds as payment for their efforts.

The defendants contend, however, that the government failed to prove that all drug sales within Undertaker territory were performed on behalf of Richardson or Tate; it failed to show a monopoly. The defendants point to evidence of drug sales which were unrelated and say that the government attempted to explain these away as instances in which people were granted permission to sell by Richardson. They seem to argue that the existence of other operations within Undertaker territory means that there were multiple conspiracies.

So, what was the evidence the defendants point to to support their claim that there was not one but multiple conspiracies? Chew, the government witness, said on direct examination that the Undertakers controlled the drug trade and had a policy on violations, but on cross-

examination he said that although he was fired by Richardson for stealing drug money, he himself was never "violated" and continued his drug activities with Tate until he went to work for himself. When he worked for himself he bought cocaine from anyone he could. Andre Cal, who also testified for the government, said that he became a worker for another unrelated street operation conducted by codefendant Lee. There is an allegation about two competing cocaine operations: one run by Tate whose pony packs had staples through them; and one run by Curtis Kirkland, whose packs were marked with red marks. Cal, like Chew, said he was not punished for stealing money from Richardson. Cal also testified that he went into the cocaine business with Anthony Flowers, and later, when Flowers was arrested, Cal became partners with another man named Scott. This drug business was independent of the Undertakers' operation. Sargent, another conspirator who testified, said that there were several other drug operations in Undertaker territory which were not shut down. But he also said that they were not shut down because they were no competition to Richardson's operation.

This in brief is the evidence on which the defendants rely to say that the Richardson-Tate conspiracy was not a monopoly and therefore multiple conspiracies existed. But why do thc defendants see evidence of other independent dealings as fatal to the government's case?

Some of the time, the defendants seem almost to argue that the government is under some obligation to prove a monopoly; if Richardson and Tate did not monopolize the drug trade in Undertaker territory, there was a fatal variance between the government's theory

that they did and the proof at trial which showed some sales which were independent of the conspiracy. We note first that in an ordinary case there is no requirement that a conspiracy achieve some sort of monopoly in order to exist. A conspiracy can exist side by side with another conspiracy. One person can be a member of more than one conspiracy, just as any person can hold down more than one job. *United States v. Blanding*, 53 F.3d 773 n. 2 (7th Cir.1995). It seems clear, however, that disloyalty of this sort to the conspiracy was strongly discouraged in this case. There are many instances of "violations." They range from beatings with bricks, bottles, and sticks to a beating which resulted in death. But again, evidence that a few people did something in violation of the rules without getting punished could be viewed by the jury as something other than evidence that those persons were not members of this conspiracy or that there were multiple conspiracies. Perhaps those people got away with something. The jury in this case was properly instructed as to the possibility of multiple conspiracies and chose to determine that eight of those indicted were members of the charged conspiracy and that three were not.

Other times what the defendants seem to be saying is that the government proceeded on a theory of monopoly and then changed theories midstream – a claim which is relevant also to the discussion that will follow regarding a request for a bill of particulars. By the time we became acquainted with this case, the government's theory was that the Richardson-Tate conspiracy controlled the heroin trade in Undertaker territory. The theory also was that the conspiracy controlled the crack trade in 1990 and 1991 but that the control of cocaine sales was less complete,

and some unconnected sellers were operating either because their sales did not threaten the conspiracy or because Richardson gave them permission to operate. The defendants see this theory as different from the government's theory at the outset of the case.

We are not so sure. The indictment alleged that "the sale of user quantities of cocaine, cocaine base and heroin in Undertaker Territory was subject to the approval of defendants EDDIE RICHARDSON and CARMEN TATE." Now the government is saying that there was control of the heroin and crack markets for periods of time, but that cocaine sales were not so tightly controlled in that other cocaine dealers operated either with approval or because they were not large enough to be a threat. Nothing in that theory is materially inconsistent with the indictment.

Next, the defendants say that the statement in the government's February 21, 1995, proffer also reveals an inconsistency. The statement says that "[u]nder the rules of the gang, no one could sell heroin in Undertaker Territory without the permission of Richardson." We are unable to find an inconsistency between that theory and the one we have been presented.

But the defendants' real contention, we believe, is that the government's theory was that the gang had a monopoly and that therefore anyone who sold drugs in the territory was considered by the government to be a member of this conspiracy, virtually without any other proof. They say:

> As shown at trial, there were numerous people selling drugs within the area established for the single, overall conspiracy charged in the

> indictment who had no agreement with Richardson or Tate. . . . The defendants, in their requests for a bill of particulars, repeatedly objected that the government's true theory was that the charged conspiracy was the gang and membership in the gang amounted to membership in the conspiracy. . . . Furthermore, the government's explanations of "permission" or "no competition" were merely afterthoughts to salvage the indictment once the trial testimony made clear that rather than a single overall conspiracy led by Richardson and Tate, there existed a myriad of independent drug sellers who were operating throughout Undertaker territory – some in virtual head to head competition with each other.

Or as Curry puts it more explicitly, the government's theory was that Richardson and Tate controlled the neighborhood "to such an extent that the only drugs available in that neighborhood came from Richardson or Tate and were sold by gang members."

If the government had relied solely on a syllogism – that Richardson and Tate had a monopoly on drug sales in the Undertaker territory; defendants sold drugs in the territory; therefore defendants sold drugs for Richardson and Tate and were members of the conspiracy – and if there was no other evidence of the connection of the defendants to the conspiracy and further that the premise itself was faulty, the argument would have considerable force. But there was evidence and lots of it. The government presented tape recordings of each defendant except Richardson and Tate – as well as direct evidence of the acts and statements of each of the charged conspirators – sufficient to establish his personal involvement in the

conspiracy. The evidence in this case was clearly sufficient to support the jury's verdict that a single conspiracy existed and that each convicted dealer was a member of the conspiracy.

Palmer, Smith, and Curry argue individually that there is insufficient evidence to link them to the conspiracy. We reject their arguments. Evidence of Palmer's membership includes two sales of crack to Agent Rotunno from the beefstand in November 1990. Plus, Schwede told Rotunno that Palmer was selling crack for the Undertakers and Sargent testified that Palmer sold crack at the beefstand. The beefstand, of course, was an important part of the Richardson operation.

Evidence of Curry's membership came from Cal and Sargent, who identified Curry as a seller of white heroin for the Undertakers and as his best worker. Curry was arrested while selling white heroin at Harrison and Kilpatrick, another of the Undertakers' drug spots. Furthermore, Curry told Rotunno that he had made more than $50,000 selling drugs for Richardson and Tate. In addition, he sold crack from the beefstand and was one of the first workers at the beefstand. On January 14, 1991, Agent Rotunno bought 10 bags of crack from Curry, and in a taped conversation in June of that year Curry confirmed that he still worked for Richardson and Tate. He bragged – though it appears everyone discounts his claim – that he showed the Undertakers how to make rocks from cocaine.

As to Smith, he admitted that he sold drugs for Richardson and Tate for 3 years but claims there is no evidence that he joined the conspiracy. We disagree. He

sold both heroin and crack and he witnessed a "violation." He said on tape that he made roughly $50,000 during the time he worked for Richardson and Tate. There was sufficient evidence for the jury to conclude that he was a member of the conspiracy. We now turn to several pretrial issues.

Curry contends that he is entitled to a new trial because Judge Holderman failed to grant his pretrial and repeated oral motions during trial for a bill of particulars. His argument is that the government changed its theory of this case mid-trial, as we just discussed. The theory at the beginning of trial, Curry says, was that membership in the Undertaker Vice Lords made one a member of the drug distribution conspiracy. When Judge Holderman made clear that theory was not going to work, Curry contends that the government, for the first time, came up with the theory that no one sold drugs in Undertaker territory without Richardson's blessing, and if you sold drugs you thereby joined the conspiracy. In essence, Curry contends that he was involved with Curtis Kirkland, someone who, Curry says, all the government witnesses conceded was not a member of the conspiracy, and that it was this bit of information which caused the government to switch to a permission theory. Curry says he should have been granted his repeated requests for a bill identifying, at a minimum, the alleged conspirators.

The decision whether to require a bill of particulars is within the sound discretion of the trial judge. We will reverse a decision to deny a bill of particulars only when the judge clearly abuses his discretion. A defendant must suffer actual prejudice from the denial. *United States v. McAnderson*, 914 F.2d 934 (7th Cir.1990). But Curry is only

entitled to know the offense with which he is charged, not all the details of how it will be proved. *United States v. Kendall*, 665 F.2d 126 (7th Cir.), *cert. denied*, 455 U.S. 1021 (1981). As we said above, from the indictment Curry was notified of the permission theory. It said that the sale of user quantities of cocaine, cocaine base, and heroin in Undertaker territory was subject to the "approval" of Richardson and Tate. "Approval" and "permission" are words which, in this context, convey the same principle. Judge Holderman, on this point, did not abuse his discretion.

Richardson and Tate each argue that they should have been granted separate trials. Their basic contention is that prejudicial testimony was elicited during the cross-examination of the government witnesses. We note at the outset that most of the testimony would have been admissible in separate trials. Richardson claims that defenses antagonistic to his were presented by Curry, Dockery, and Hall. The three claimed that they were recruited by Richardson, who took advantage of their addictions to get them to sell drugs. In addition, Richardson contends that two pieces of evidence would not have been admitted in a separate trial. One was a tape of a discussion between Agent Rotunno and Curry, in which Rotunno makes a remark about Richardson and Tate being "bad guys." The other is the proffer of Nate Hall, used by the government in its rebuttal case.

Tate makes a similar argument regarding antagonistic defenses; he finds the defenses of Curry, Hall, Palmer, Dockery, and another defendant, Randy Teagus (who was acquitted), were antagonistic to him regarding their claims to be addicts, selling drugs to support a habit. In

addition, Hall, Palmer, and Dockery, Tate claims, solicited testimony that they were subjected to "violations" ordered by Tate and testimony that a drug seller died of a beating. Tate contends that even the government objected to the latter testimony as being prejudicial.

There is a preference in the federal system for joint trials of defendants who are indicted together. Nevertheless, Rule 14 of the Federal Rules of Criminal Procedure allows for an order of severance or other relief which justice may require if a defendant is prejudiced by a joinder with others. In *Zafiro v. United States*, 506 U.S. 534 (1993), the Court concluded that mutually antagonistic defenses are not prejudicial per se. In fact, the Court concluded that a judge should grant a severance only if there is a "serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." At 539. Even if there is a risk of prejudice, a judge must determine whether it is the type of prejudice that can be cured with limiting instructions to the jury. The decision whether to grant a severance is left to the sound discretion of the trial judge. *Id.*

In this case, the judge declined to order a severance but instructed the jury that it was to give separate consideration to each defendant; that each defendant was entitled to have his case decided on the evidence against him. We, of course, presume that a jury follows the instructions as given. *United States v. Crockett*, 979 F.2d 1204 (7th Cir.), *cert. denied*, 507 U.S. 998 (1992). Furthermore, blame-shifting does not prevent a jury from making a reliable judgment regarding a defendant. *United States v. Ramirez*, 45 F.3d 1096 (7th Cir.1995). And as we said above, the

testimony of the government witnesses, Chew, Cal, and Sargent, of which Tate especially complains, would be admissible in separate trials. As the Court said in *Zafiro*:

> [A] fair trial does not include the right to exclude relevant and competent evidence. A defendant normally would not be entitled to exclude the testimony of a former codefendant if the district court did sever their trials, and we see no reason why relevant and competent testimony would be prejudicial merely because the witness is also a codefendant.

At 540. It was not an abuse of discretion to deny the motions for severance.

The defendants also challenge a number of evidentiary rulings. These rulings are reviewed for an abuse of discretion. *United States v. Prevatte*, 16 F.3d 767 (7th Cir.1994); *United States v. Buchbinder*, 796 F.2d 910 (7th Cir.1986); *United States v. Johnson*, 28 F.3d 1487 (8th Cir.), *cert. denied*, 513 U.S. 1098 (1994); *United States v. Davis*, 772 F.2d 1339 (7th Cir.), *cert. denied*, 474 U.S. 1036 (1985).

Nate Hall objects to the exclusion of his expert witnesses. One expert was Dr. Maisha Hamilton-Bennett, who was to testify as to the extent of Hall's drug addiction which he contended went to his coercion defense. The second was Jesse Beckom, who was an expert on gangs. Hamilton-Bennett's testimony was excluded because there was no dispute that Hall was an addict and the defense did not provide timely notice of its intent to call her. In fact, the government received her report over 5 weeks into the trial. Also, other evidence – of which there was plenty – of Hall's addiction was presented to the jury by other witnesses. Beckom's testimony was

excluded on the basis of relevance because he had no familiarity with the Undertaker Vice Lords or its members. We see no abuse of discretion on this point.

Hall also claims that the government should not have been allowed to use his proffer in its rebuttal case. A proffer, of course, is a defendant's (or someone who is hoping not to become a defendant) controlled statement to government agents made to facilitate plea agreements or discussions. Hall entered into a proffer agreement under which the government agreed not to use the information he provided during its case-in-chief. If Hall testified contrary to the agreement, however, or presented a position contrary to the substance of the agreement, all deals were off and the government would be allowed to use his statements against him. This sort of provision is standard fare in pretrial dealings over statements to be offered by defendants.

In Hall's proffer he said he participated in the conspiracy and began selling drugs after being approached by another member of the conspiracy. He said Richardson was the source of the heroin he sold. These statements were interpreted by the government to show that Hall was a willing participant in the conspiracy. At trial, Hall seemed to be trying to set up a defense of coercion. He called a police officer named Rodriguez to testify as to a pat-down of Hall in which drug paraphernalia was found, including a warm crack pipe and an empty bag which had previously contained crack. He was trying to show that he was a drug user and thus that he was coerced into selling drugs. This view of his situation was contrary to the gist of his proffer where he presented

himself as a willing participant in the drug selling conspiracy. Under the circumstances, Judge Holderman didn't even come close to abusing his discretion when he permitted the government to use part of Hall's proffer against him as part of its rebuttal case. And it mattered not at all that Hall didn't personally testify contrary to the proffer because he in effect did the same thing by presenting Officer Rodriguez to the jury. *See United States v. Dortch*, 5 F.3d 1056 (7th Cir.), *cert. denied*, 114 S.Ct. 1077 (1993).

Finally, Carmen Tate argues that the district court improperly admitted evidence of a heroin seizure from him and others in June 1985. Tate claims this was evidence of a prior bad act, requiring analysis under Rule 404(b) of the Federal Rules of Evidence. But the seizure occurred during the existence of the conspiracy and the evidence was admitted pursuant to Rules 401 and 403. We see no abuse of discretion in this ruling.

Curry contends that, given his culpability and the severity of the sentence he was facing, he should have been allowed to tell the jury of his possible punishment during closing argument. Unfortunately for him, arguing punishment to a jury is taboo, as we again recently noted in *United States v. Lewis*, 110 F.3d 417 (7th Cir.1997), *cert. denied*, 66 U.S.L.W. 3258 (U.S. Oct. 7, 1997) (No. 96-9532). Furthermore, there is a difference of opinion regarding Curry's role in this offense. He claims he was a rather pathetic junkie who dealt some drugs to support his habit. Not everyone saw it that way. In his sentencing memorandum Judge Holderman, who saw the evidence firsthand, said Curry was not a minor participant in the conspiracy, but rather that he distributed and foresaw

distribution of at least 30 kilograms of heroin and at least 7.5 kilograms of cocaine base.

All of the defendants contend that the prosecutor improperly vouched for witnesses during her rebuttal argument. The government virtually concedes that the prosecutor's statement was improper but contends that the response was invited by the argument of Curry's defense counsel. The relevant portions of the record are as follows: first, counsel for Curry:

> And I want to talk about one other thing Mr. Krulewitch [AUSA] mentioned. He said to you he represents the people of the United States. I think that was an attempt to somehow bring this home to you. I think it was an attempt to get some sympathy from you. . . .
>
> Mr. Krulewitch doesn't represent the interest of the people of the United States. The people are left to the states. . . .
>
> These people represent the interest of the federal government from Washington. They represent the interests of the federal agencies, like the Internal Revenue Service, like the U.S. Drug Enforcement Administration, like the Alcohol, Tobacco & Firearms. . . . But I do begrudge them trying to turn the war on drugs onto the victims of the war on drugs.

This, the government says, invited its response, given by another AUSA, Zaldwaynaka Scott:

> You heard about the government's witnesses. You heard them called all kinds of things, despicable, ridiculous, and some of the words Mr. Halprin used, I won't even repeat.

> And you heard about Agent Rotunno, you heard about the police officers that were called as witnesses in this case. You heard everybody called a liar. And you heard about what happened from the government's table in this case. The government put these witnesses on. The government called these liars. It's the government's fault.
>
> Well, ladies and gentlemen, if you think that Krulewitch, myself, Agent Hlista, and Agent Zopp went out there, called these people into this courtroom and put on perjured testimony, then you should acquit these men. You should send them home, because we had nothing else better to do with our careers and our lives but put on false testimony[.]

There were objections to these statements, and Judge Holderman gave an instruction to the effect that the opinions of counsel are not evidence. The jury was told to disregard the statement. In his instructions to the jury the judge also stated that it is improper for a lawyer to offer his personal opinions on the credibility of witnesses during an argument to the jury.

We use a two-part analysis in assessing allegations of prosecutorial misconduct in closing argument. First we consider the prosecutor's remarks in isolation to see whether they are improper. We will waste no time on this step; impropriety is virtually conceded. The second step is to consider the remarks in context to see whether they had the effect of denying the defendants a fair trial. We look to the nature and seriousness of the statement; whether it was invited by the conduct of defense counsel; whether the jury was properly instructed to disregard the

statement; whether the defense had an opportunity to counter the statement; and finally we look to the weight of the evidence against the defendants. *United States v. Johnson-Dix*, 54 F.3d 1295 (7th Cir.1995); *United States v. Severson*, 3 F.3d 1005 (7th Cir.1993).

The defendants had no opportunity to counter the prosecutor's statement, and the statement is one of which we disapprove. However, in every other regard, the factors lean against finding that the defendants were deprived of a fair trial. It is at least arguable that it was an invited response in the heat of battle, after several arguments attacking the government case. And also, importantly, the evidence in this case was such that this statement was not needed to put the government over the top. The weight of the evidence is clearly against the defendants. It defies credibility to think that one isolated statement coming at the close of a lengthy trial would sway the jury to cast aside doubts about the veracity of the government witnesses. Finally, the jury was instructed that the remark was improper, and we assume the jury follows instructions given by a judge. It was, to be sure, an improper remark, but another adjective that comes to mind is that it was a stray remark. Coming as it did, at the end of a long trial, with the judge giving a curative instruction, this remark does not make for prejudicial error.

Moving on to jury instructions, we note that Richardson and Tate both argue that it was error for the judge not to give a unanimity instruction to the effect that the jury had to agree on the three federal narcotics offenses constituting the continuing criminal enterprise with which they were charged in count two. The argument is

based on a case from the Court of Appeals for the Third Circuit, *United States v. Echeverri*, 854 F.2d 638 (1988). In *United States v. Kramer*, 955 F.2d 479, *cert. denied*, 506 U.S. 998 (1992), we expressly rejected the result in that case. We see no reason to reconsider *Kramer*.

The defendants also raise an issue regarding improper juror conduct which they say was not adequately investigated by the judge. After the close of the evidence but before closing arguments, an alternate juror wrote Judge Holderman saying that she had some concerns about the regular jurors. She said some of them "appear to be sleeping" during the presentation of evidence and that she did not think it proper that persons who would know less about the case than the alternates would be the ones deciding it. Plus, she said she had not heard some of the people say much during the time the jurors had spent together; she wondered how they could be expected to speak up in deliberations. The defendants argue that the judge should have questioned the alternate juror about the letter. We don't think that was necessary. The letter does not allege any outside contact with the jurors or untoward improprieties. We have, in fact, read the letter, and to us it seems like the alternate juror was just venting some sour grapes because she was not, after sitting in on the whole trial, going to get a chance to deliberate.

All of which brings us to sentencing issues. The defendants join in an argument that they should be sentenced under the guidelines for amounts of drugs reasonably foreseeable to them, rather than under the enhanced penalties in 21 U.S.C. § 841(b) for distributing in excess of one kilogram of heroin. The argument is based on the fact

that the quantities of drugs distributed were not alleged in the indictment.

We have previously explained why we do not require that the quantities be alleged in the indictment in order for the enhanced penalty provisions to apply. *See United States v. Levy*, 955 F.2d 1098 (7th Cir.), *cert. denied*, 506 U.S. 833 (1992). We pointed out that while defendants are entitled to receive notice of the possibility of an enhanced sentence (and defendants here received notice through a separate notice to them or through pretrial discovery), the notice need not be included in the indictment. The quantity of drugs is a sentencing factor, not an element of the offense. *See United States v. Edwards*, 36 F.3d 639 (7th Cir.1994). At the sentencing hearing, of course, the defendants must be allowed to contest the quantities of drugs attributed to them. There is no claim here that the sentencing proceedings did not provide them with that opportunity.

Curry's individual challenge to his § 841(b) enhancement is related to his eight prior state court felony convictions for narcotics violations. Prior to trial, the government notified Curry of its intention to seek enhanced penalties pursuant to § 841(b)(1)(A), which provides for a mandatory term of life imprisonment where the defendant has two or more convictions for a felony drug offense at the time he committed the offense for which he is being sentenced. Curry points out, however, that under the sentencing guidelines he would not receive criminal history points because all eight of his prior state court convictions grew out of what has been alleged as the conspiracy in this case. He argues that therefore they should not be relevant under § 841(b). We

rejected a similar argument in *United States v. Garcia*, 32 F.3d 1017 (7th Cir.1994). Curry attempts to distinguish Garcia because Garcia continued to participate in the drug conspiracy after his conviction. Curry claims that following his last state court conviction he entered treatment and ceased his drug activity. His argument loses some force, however, when we remember that before his last conviction he had seven other convictions, which are harder to explain away and which support the draconian enhancement which was correctly applied to him under § 841(b).

Next we go to the issue of drug quantities reasonably foreseeable to certain defendants, pursuant to United States Sentencing Guideline § 2D1.1. Lee and Smith both contend that they were held accountable for much larger quantities than they should have been. However, the court clearly articulated its reasons for each calculation as required. *See United States v. Goines*, 988 F.2d 750 (7th Cir.1993).

Lee was found accountable for 30 kilograms of white heroin and at least 5 kilograms of crack, giving him an offense level of 38. He contends that the judge erred in the calculations of these amounts. We note that the judge would have had to err in both calculations in order for the offense level to be lowered, and the error as to cocaine base would have to be significant. He is eligible for level 38 for distributing either 30 kilograms of heroin or 1.5 kilograms of cocaine base.

Specifically, Lee contends that the judge's calculations assume that the heroin packets with which Lee was involved weighed .15 grams on the average. The judge's

estimate – and he is allowed to estimate as we said in *United States v. Acosta*, 85 F.3d 275 (7th Cir.1996) – is based on all but one of the seizures of heroin made during the course of the conspiracy. The one exception was a seizure on December 12, 1990, from William Johnson; those packets weighed substantially less than the others. Johnson's heroin was not included in the calculations and Judge Holderman did not rely on the weight of these bags, a determination which cannot be said to be erroneous. Johnson, in a recorded conversation with the agent who bought the heroin, said that his heroin was different from Richardson's. The jury apparently believed him and acquitted him of the conspiracy charges in this case. It was not error to refuse to calculate quantities based on Johnson's bags, which were not typical of those sold by the conspiracy.

Lee also contends that Judge Holderman improperly estimated the time during which he was a member of the conspiracy. He argues that he should not be held accountable for any heroin after he ceased being a runner. However, he continued to deal with and sell heroin for the conspiracy. Changing jobs does not remove one from a conspiracy. Further, he contends that it was error to find that 2 months worth of crack sales were reasonably foreseeable to him. We disagree. The record shows that Lee sold crack at the beefstand. He was identified by Cal in a videotape of sales from that location, where large numbers of sales took place in a rather open fashion. It is not error to find that Lee could foresee 5 kilograms of crack sales.

Likewise, Smith contends that the amounts attributed to him were not reasonably foreseeable. Judge Holderman calculated Smith's offense level based on 30

kilograms of brown heroin. The calculation is not clearly erroneous. In addition, however, because Smith had two felony drug convictions that enhance his sentence under § 841(a)(1), he would be eligible for a life sentence if at least 1 kilogram of heroin or 50 grams of cocaine base were found to be foreseeable to him. Smith said in a tape-recorded conversation with Agent Rotunno that he worked for Tate and Richardson for about 3 years selling heroin and that he made about $50,000. That would mean that Smith personally sold 3.5 kilograms of brown heroin, clearly sufficient to support a life sentence. As it turned out, the government moved for a downward departure, giving the court discretion to impose the sentence of 194 months, which Smith ultimately received.

Palmer raises a different sentencing issue. The court found that he could reasonably foresee 2 months worth of crack distribution from the beefstand, where he personally was selling crack for a 2-month period. Palmer contends that he should receive a reduction of his sentence because he was a minor participant, under § 3B1.2(b) of the guidelines. However, finding that Palmer was responsible for 2 months of sales of one of the drugs the conspiracy sold from one of the several locations it used is clearly not holding Palmer responsible for the sales of the broader operation. If the court had held Palmer responsible for all the drugs sold at this spot, his argument would be more persuasive. As it is, the finding already inherently acknowledges Palmer's limited responsibility. It was not error to decline to apply the 2-point reduction he seeks.

Finally, ending our discussion with a whimper, not a bang, we mention Westmoreland's claim that the disparity in sentencing for crack as opposed to cocaine

violates the Constitution. The argument has been laid to rest in this court. *See United States v. Lawrence*, 951 F.2d 751 (7th Cir.1991); *United States v. Booker*, 73 F.3d 706 (7th Cir.1996).

The convictions and sentences of the defendants are

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Supreme Court of the United States

No. 97-8629

Eddie Richardson,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to the following question: "Whether the district court committed reversible error in failing to instruct the jury that it must agree unanimously on which particular drug violations constituted the 'series of violations' required for conviction for conducting a continuing criminal enterprise in violation of U.S.C. § 848."

October 5, 1998